

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

NORFOLK SOUTHERN RAILWAY  
COMPANY

Plaintiff,

v.

PHILADELPHIA INDEMNITY  
INSURANCE COMPANY

Defendant.

CASE NO: 1:23-cv-119

**COMPLAINT**

Plaintiff Norfolk Southern Railway Company (“Norfolk Southern”), by and through its attorneys, files this Complaint against defendant Philadelphia Indemnity Insurance Company (“PHLY”), and in support thereof avers as follows:

**PARTIES**

1. Norfolk Southern is a corporation organized under the laws of the Commonwealth of Virginia with a principal place of business in Atlanta, Georgia.

2. PHLY is a corporation organized under the laws of the Commonwealth of Pennsylvania with a principal place of business in Bala Cynwyd, Pennsylvania.

**JURISDICTION**

3. Jurisdiction in this matter is based upon 28 U.S.C § 1332 because there is complete diversity of citizenship between Norfolk Southern and PHLY, and because the amount in controversy exceeds \$75,000.

**VENUE**

4. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred within this judicial district.

**PREDICATE FACTS**

5. On or about April 6, 2021, Norfolk Southern and Resetarits Construction Corporation (“RCC”) entered into a construction contract designated Contract No. 1440007681 (the “Construction Contract”) relating to the construction of a rail car shop on Norfolk Southern’s property in Cheektowaga, New York (the “Project”).

6. On or about August 12, 2021, PHLY issued a performance bond designated Bond No. PB00464500558 (the “Performance Bond”) on behalf of RCC relating to the Construction Contract.

7. The Performance Bond identifies RCC as the contractor and principal, PHLY as the surety, and Norfolk Southern as the owner.

8. The Performance Bond is issued in the amount of \$4,621,497.00 consistent with the original estimate for the cost to complete the Construction Contract.

9. Pursuant to the Performance Bond, PHLY agreed to bind itself with RCC, jointly and severally, in guarantying the completion of the Construction Contract.

10. The Construction Contract is expressly incorporated into the Performance Bond.

11. RCC, however, failed to comply with the requirements set forth the Construction Contract and failed to complete its performance under the Construction Contract.

12. RCC was provided with multiple notices of deficient work product and deficient performance of its obligations set forth in the the Construction Contract and, despite repeated

opportunities to cure these defects and deficient performance, failed to remediate its defects and deficient performance and further breached the Construction Contract.

13. By the Spring of 2022, Norfolk Southern began including PHL Y in the conversations with RCC regarding RCC's continued failures to cure its defects and deficient performance and additional breaches of the Construction Contract.

14. On March 24, 2022, Norfolk Southern issued a notification to PHL Y pursuant to Section 3.1 of the Performance Bond articulating RCC's breaches of the Construction Contract, advising PHL Y of Norfolk Southern's intention to declare a default, and requesting a meeting with PHL Y.

15. On May 17, 2022, a meeting and site inspection was held between representatives of Norfolk Southern, RCC, and PHL Y at the site of the Project.

16. RCC was provided additional opportunities to cure its defects and deficient performance and avoid the declaration of a default and termination of the Construction Contract.

17. RCC again failed to cure its defects and deficient performance and further breached the Construction Contract.

18. On or about June 27, 2022, Norfolk Southern's engineer observed RCC and/or its subcontractor operating equipment in an unsafe manner risking the safety of personnel and property in direct violation of the express directions of the engineer.

19. Accordingly, a stop work order was issued and RCC was no longer permitted onto Norfolk Southern's property.

20. A second notice of intention to declare a contractor default under Section 3.1 of the Performance Bond was issued by Norfolk Southern on July 15, 2022.

21. Additionally, Norfolk Southern began receiving demands from subcontractors and/or vendors of RCC for payment of amounts that RCC failed to pay. Norfolk Southern promptly directed those claims to PHL Y pursuant to a payment bond also issued by PHL Y.

22. A second meeting was held between representatives of Norfolk Southern, RCC, and PHL Y on July 22, 2022.

23. The conference held on July 22, 2022 pursuant to Section 3.1 of the Performance Bond failed to resolve Norfolk Southern's concerns over RCC's defaults under the Construction Contract.

24. On October 21, 2022, Norfolk Southern declared RCC in default and terminated the Construction Contract pursuant to Section 3.2 of the Performance Bond because RCC materially breached the Construction Contract.

25. Also on October 21, 2022, Norfolk Southern notified PHL Y pursuant to Section 3.2 and 3.3 of the Performance Bond about the declaration of default, the termination of the Construction Contract, and Norfolk Southern's agreement to pay the balance of the price due on the Construction Contract to PHL Y in accordance with the Construction Contract and the requirements of the Performance Bond.

26. All payments properly due to RCC under the Construction Contract were timely paid by Norfolk Southern.

27. Norfolk Southern performed, completed, and/or complied with all material terms of the Construction Contract.

28. Norfolk Southern tendered its claim under the Performance Bond to PHL Y and demanded that PHL Y fulfil its obligations under the Performance Bond and complete the Construction Contract.

29. Norfolk Southern cooperated with PHL Y during PHL Y's investigation into Norfolk Southern's claim, produced thousands of pages of requested records, and provided PHL Y's representative with access to the Project site.

30. In response to Norfolk Southern's claim under the Performance Bond, PHL Y elected to attempt to arrange for RCC to resume work on the Project and complete the Construction Contract.

31. However, PHL Y did not provide the assurances needed for Norfolk Southern to agree to RCC reentering upon Norfolk Southern's property to resume work on the Project given RCC's demonstrated inability to perform its work safely and in accordance with designs and the directions of Norfolk Southern's engineer.

32. All preconditions under the Performance Bond for Norfolk Southern's claim against PHL Y have occurred and/or been performed.

33. On February 2, 2023, PHL Y issued a notice to Norfolk Southern denying liability under the Performance Bond.

**Count I – Breach of Contract**

34. Norfolk Southern incorporates all preceding paragraphs as if fully set forth herein.

35. PHL Y agreed to complete the Construction Contract in the event that RCC failed to complete the Construction Contract.

36. RCC failed to complete the Construction Contract.

37. Norfolk Southern made all required payments properly due to RCC under the Construction Contract.

38. Norfolk Southern completed and/or complied with all material terms of the Construction Contract.

39. Norfolk Southern provided PHL Y and RCC with the notice of Norfolk Southern's intention to declare a default required under the Performance Bond.

40. RCC's defaults under the Construction Contract were not and/or could not be cured.

41. Norfolk Southern declared RCC in default under the Construction Contract and terminated the Construction Contract because RCC materially breached the Construction Contract and provided PHL Y with notice of the same.

42. In accordance with the terms of the Performance Bond, Norfolk Southern agreed to pay the balance of the price owed for the completion of the Construction Contract to PHL Y or a contractor selected by PHL Y in accordance with the Construction Contract.

43. Norfolk Southern cooperated with and assisted PHL Y in its investigation into Norfolk Southern's claim under the Performance Bond.

44. PHL Y, however, failed to perform its obligations to Norfolk Southern by failing to complete the performance of the Construction Contract and/or arranging for a contractor to complete the Construction Contract.

45. As a result of PHL Y's failure to perform its obligations to Norfolk Southern under the Performance Bond, Norfolk Southern has and/or will incur the costs of correcting, repairing, and/or replacing the defective work performed by RCC and completing the work RCC and PHL Y were obligated to perform under the Construction Contract.

46. The damages Norfolk Southern has and will incur because of PHL Y's failure to perform its obligations under the Performance Bond are in an amount to be proven at trial and are in excess of \$75,000.

47. Norfolk Southern is entitled to recover from PHL Y the full cost of completing and repairing the scope of work embodied in the Construction Contract, all costs incurred making

repairs and corrections to the work performed by RCC, together with any damages allowed under the Construction Contract including, but not limited to, attorneys' fees and expenses, plus interest at the maximum legal rate and the costs of this action.

**WHEREFORE**, plaintiff Norfolk Southern Railway Company, respectfully demands that judgment be entered in its favor and against defendant Philadelphia Indemnity Insurance Company:

(1) declaring and directing PHLI to perform its obligations under the Performance Bond, and any documents and/or agreements incorporated into the Performance Bond, issued for the benefit of Norfolk Southern; and

(2) awarding Norfolk Southern all costs it incurred for completing the scope of work embodied in the Construction Contract, all costs incurred making repairs and corrections to the work performed by RCC, together with any damages allowed under the Construction Contract including, but not limited to, attorneys' fees and expenses, plus interest at the maximum legal rate and the costs of this action; and

(3) such other and further relief as the Court deems just.

COHEN & PALOMBO P.C.

By: /s/ Jeffrey D. Cohen  
Jeffrey D. Cohen  
Timothy L. Frey  
The Times Building  
32 Parking Plaza, Suite 402  
Ardmore, PA 19003  
(215) 609-1110  
jcohen@freightlaw.net  
tfrey@freightlaw.net

*Attorneys for Norfolk Southern Railway Company*

Date: February 3, 2023